STATE OF MICHIGAN

COURT OF APPEALS

CC MID WEST, INC.,

Plaintiff-Appellant,

v

HOWARD MCDOUGALL, ESTATE OF ROBERT BAKER, ARTHUR BUNTE, JR., R. V. PULLIAM, SR., JOE ORRIE, JERRY YOUNGER, GEORGE WESTLEY, RAY CASH, and RONALD KUBALANZA,

Defendants-Appellees.

UNPUBLISHED
June 27, 2006

No. 265667
Oakland Circuit Court
LC No. 1997-550272-NZ

Before: Bandstra, P.J., and Saad and Owens, JJ.

PER CURIAM.

Plaintiff appeals the trial court's order that granted defendants' motion for summary disposition under MCR 2.116(C)(4). The trial court entered the order after it conducted further proceedings as ordered by our Supreme Court's in *CC Mid West, Inc v McDougal*, 470 Mich 878; 683 NW2d 142 (2004) ("*CC Mid West I*"). We affirm.

I

This action arises out of defendants' communications with beneficiaries of a trust they administer and whether those communications were "related to" defendants' trust administration under the Employee Retirement Income Security Act of 1974 (ERISA), 29 USC 1001 *et seq*. Plaintiff argues that the circuit court erred when it concluded that its claims are preempted by ERISA. We disagree.[1]

[1] We review the grant of a motion for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). "Jurisdictional questions under MCR 2.116(C)(4) are questions of law that are also reviewed de novo." *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 205; 631 NW2d 733 (2001) (citation omitted). In reviewing such a motion, we "must determine whether the affidavits, together with the pleadings, depositions, admissions, and documentary evidence, demonstrate . . . [a lack of] subject matter jurisdiction." *CC Mid West I*,
(continued…)

"Congress enacted ERISA to 'protect . . . the interests of participants in employee benefit plans and their beneficiaries' by setting out substantive regulatory requirements for employee benefit plans and to 'provid[e] for appropriate remedies, sanctions, and ready access to the Federal courts.'" *Aetna Health, Inc v Davila*, 542 US 200, 208; 124 S Ct 2488; 159 L Ed 2d 312 (2004), quoting 29 USC 1001(b). ERISA operates to provide a comprehensive and uniform regulatory scheme to govern employee benefit plans. *Id.* In this context, it provides that it "shall supersede any and all State laws insofar as they may now or hereafter *relate to* any employee benefit plan" covered under the statute. 29 USC 1144(a) (emphasis added).

A state law "relates to" ERISA where it has "an impermissible connection with ERISA," *MacInnes v MacInnes*, 260 Mich App 280, 284; 677 NW2d 889 (2004), or " ' "has a connection with or reference to" ' " an employee benefit plan, *Scheuneman v Gen Motors Corp*, 243 Mich App 210, 214; 622 NW2d 525 (2000) (citations omitted). In considering "whether a state law has the forbidden connection, we look both to 'the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive,' as well as to the nature of the effect of the state law on ERISA plans." *California Div of Labor Standards Enforcement v Dillingham Constr, NA, Inc*, 519 US 316, 325; 117 S Ct 832; 136 L Ed 2d 791 (1997) (citations omitted). "A state law may 'relate to' a benefit plan even if its effect on the plan is indirect and even if the law was not specifically designed to affect the plan." *Scheuneman, supra* at 215. "'It is not the label placed on a state law claim that determines whether it is preempted, but whether in essence such a claim is for the recovery of an ERISA plan benefit.'" *Cromwell v Equicor-Equitable HCA Corp*, 944 F2d 1272, 1276 (CA 6, 1991). "Generally, the ERISA preempts a state law when the state law interferes with an ERISA plan by . . . subjecting the fiduciaries of a plan to claims other than those provided for in the ERISA itself." *Scheuneman, supra* at 215.

Plaintiff's claims state common law actions for tortious interference with contractual relations and business expectancies. See *Mahrle v Danke*, 216 Mich App 343, 350; 549 NW2d 56 (1996); *Lakeshore Community Hosp v Perry*, 212 Mich App 396, 401; 538 NW2d 24 (1995). Because plaintiff's claims do not expressly refer to ERISA, *Scheuneman, supra* at 214, we must determine whether these claims otherwise "relate to" ERISA in these circumstances. See *Mackey v Lanier Collection Agency & Service, Inc*, 486 US 825, 829-831; 108 S Ct 2182; 100 L Ed 2d 836 (1988).

Our Supreme Court's remand order directed the trial court to consider any further factual development that would illuminate whether plaintiff's claims relate to ERISA or an employee benefit plan. *CC Mid West I, supra* at 878. As a potential threshold issue to establishing preemption, the Court observed that "whether the former employees remained eligible to self-contribute at the time the challenged communications were made" would bear on whether defendants had a duty to communicate developments to the employees, and thus whether ERISA preempted plaintiff's claims. *Id*; see also *Vallone v CAN Financial Corp*, 375 F3d 623, 640-641 (CA 7, 2004) (citations omitted) (reiterating that under ERISA "'fiduciaries must communicate material facts affecting the interests of plan participants or beneficiaries and this duty to communicate exists when a participant or beneficiary "asks fiduciaries for information and even

(…continued)

supra at 878; MCR 2.116(G)(5). Also, we review questions of statutory interpretation de novo. *Ayar v Foodland Distributors*, 472 Mich 713, 715; 698 NW2d 875 (2005).

when he or she does not.”’”); *Gregg v Transportation Workers of America Int’l*, 343 F3d 833, 847-848 (CA 6, 2003) (materially same); 29 USC 1104(a).

On the basis of the factual development in the trial court, plaintiff’s claims clearly relate to defendants’ administration of the fund. Defendants presented evidence that they believed that the Central Transport, Inc. (Transport) employees were to be laid off. Plaintiff presented no evidence to refute this. Moreover, defendants presented evidence that, for approximately two years following Transport’s shutdown, the Central States, Southeast and Southwest Regions Pension Fund (Pension Fund) accepted self-contributions from former Transport employees. Again, plaintiff presented no evidence to refute this. See *Jones v Slick*, 242 Mich App 715, 718; 619 NW2d 733 (2000) (noting that a court reviews whether the evidence demonstrates no genuine issue of material fact); see also *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996) (noting that, in examining whether genuine issues of material fact remain, the non-moving party may not simply rely on its pleadings or allegations). Coupled with the unrefuted evidence of defendants’ understanding of the Transport employees’ laid off status, under the Pension Fund’s interpretation and implementation of its plan document then in effect, Transport’s employees were eligible to self-contribute to their pensions before and after the communications at issue. This indicates that “the former employees remained eligible to self-contribute at the time the challenged communications were made.” *CC Mid West I, supra* at 878. It is therefore clear that defendants’ actions related to their administration of the Pension Fund. 29 USC 1144(a).

As this Court indicated in the prior opinion, “defendants, as fiduciaries of the Pension Fund, had a statutory obligation under ERISA to inform plan participants of matters that could affect their interests under the plan.” *CC Mid West, Inc v McDougall* (On Remand), unpublished opinion per curiam of the Court of Appeals, issued January 17, 2003 (Docket No. 213386) (“*CC Mid West II*”), p 5, vacated 470 Mich 878 (2004); see also *Vallone, supra* at 640-641; *Gregg, supra* at 847-848; 29 USC 1104(a). Defendants presented evidence that the two disputed communications were made for purposes of their administration of the Pension Fund and that they sought to inform Transport employees of their pension self-contribution rights and their potential to jeopardize them were they to work for an affiliate of Transport. Together with defendants’ belief that the employees were laid off, this supports the circuit court’s conclusion “that Defendants were administering the Fund when they communicated with the participants . . . [concerning] the status of benefits under the [F]und.”

“A state-law claim is not expressly preempted under . . . [ERISA] merely because it requires a cursory examination of ERISA plan provisions.” *Trustees of the AFTRA Health Fund v Biondi*, 303 F3d 765, 780 (CA 7, 2002). Conversely, such a claim is preempted if it “ ‘requires the court to interpret or apply the terms of an employee benefit plan.’ ” *Id.*, quoting *Collins v Ralston Purina Co*, 147 F3d 592, 595 (CA 7, 1998). Plaintiff’s claims hinge on the propriety of defendants’ communications. As the panel noted in the previous opinion, resolution of these claims would require this Court to “go beyond a ‘cursory examination’ of the plan’s provisions and interpret its terms.” *CC Midwest I, supra* at 5. This is so because defendants’ communications stemmed directly from their interpretations of the Pension Fund’s plan then in existence. Further, we find controlling the following reasoning from the earlier opinion:

> While we recognize that plaintiff also alleges injuries concerning its dealings with owner[-]operators throughout the trucking industry that had no prior association

> with Transport, we are not persuaded that these allegations are sufficient to avoid preemption. Plaintiff does not allege in the Complaint that defendants communicated with non-participant owner-operators in any respect. Thus, even if defendants knew or reasonably should have known that owner-operators throughout the industry might become aware of these communications, the character of these communications as between defendants as fiduciaries and former Transport owner-operators as plan participants does not render the doctrine of preemption inapplicable here. In similar vein, the fact that plaintiff may be left without a meaningful remedy does not alter the fact of preemption. *Muse v International Business Machines Corp*, 103 F3d 490, 495 (CA 6, 1995); *Massachusetts Cas Ins Co v Reynolds*, 113 F3d 1450, 1454 n 2 (CA 6, 1997). [*CC Midwest I, supra* at 6.]

Plaintiff argues that Thomas Nyhan's testimony established that defendants knew the Transport employees were to be terminated, referencing communications between Nyhan and the Teamsters union's counsel, James McCall. Plaintiff refers only to the first portion of this testimony, however. Nyhan's entire testimony indicates that, though the first contact suggested the employees were to be terminated, subsequent communications between the two established that the employees were to be laid off. The initial communication was superseded, in Nyhan's estimation, by the subsequent communications. Plaintiff's argument is therefore without merit.

Plaintiff also asserts that disputed questions of fact remain concerning defendants' motive and intent at the time the communications were made. As noted, however, plaintiff presented no evidence to substantiate its claim or to refute the evidence presented by defendants. Plaintiff merely continues to allege that it was singled out by defendants for disparate treatment unrelated to Pension Fund administration. See *Quinto, supra* at 362 (noting that, in examining whether genuine issues of material fact remain, the non-moving party may not simply rely on its pleadings or allegations).[2]

II

Plaintiff contends that the trial court erred when it granted summary disposition because discovery was ongoing. We disagree. "[A] motion for summary disposition is generally premature if granted before completing discovery regarding a disputed issue . . . ." *Davis v Detroit*, 269 Mich App 376, 379; 711 NW2d 462 (2006). However, "summary disposition is not premature if there is no fair chance that further discovery will allow the party opposing the motion to present sufficient support for its allegations." *CMI Int'l, Inc v Intermet Int'l Corp*, 251 Mich App 125, 135; 649 NW2d 808 (2002). "If a party opposes a motion for summary disposition on the ground that discovery is incomplete, the party must at least assert that a dispute does indeed exist and support that allegation by some independent evidence." *Bellows v Delaware McDonald's Corp*, 206 Mich App 555, 561; 552 NW2d 707 (1994). "Mere conjecture

[2] Plaintiff vaguely points to alleged inconsistencies in Nyhan's testimony, but fails to specifically identify how this testimony was, in fact, inconsistent.

does not entitle a party to discovery, because such discovery would be no more than a fishing expedition." *Davis, supra* at 380.

Here, while plaintiff asserted that summary disposition was premature because discovery was not complete, plaintiff failed to indicate what aspect of the ERISA preemption issue remained disputed and discoverable, and failed to support such a position with independent evidence. *Bellows, supra* at 561. On appeal, plaintiff further fails to indicate what additional evidence supports its position. The parties conducted substantial discovery in the trial court. As we concluded, the evidence conclusively showed that defendants had a fiduciary obligation under ERISA to communicate the matters at issue at the time they were communicated. Plaintiff produced no evidence to contradict this position. Accordingly, there is "no fair chance that further discovery w[ould] allow . . . [plaintiff] to present sufficient support for its allegations." *CMI Int'l, Inc, supra* at 135.

Plaintiff also claims that, on the basis of the law of the case doctrine, the trial court had to permit the discovery period to be completed before it entered a summary disposition order. Under the law of the case doctrine, a lower tribunal "may not take action on remand that is inconsistent with the judgment of the appellate court." *Grievance Administrator v Lopatin*, 462 Mich 235, 260; 612 NW2d 120 (2000). Our Supreme Court's remand order directed the circuit court to permit "further factual development" to "assist" it in addressing whether defendants' communications were related to their ERISA fund management duties. *CC Mid West I, supra* at 878. As a potential threshold issue, the Court suggested that "whether the former employees remained eligible to self-contribute at the time the challenged communications were made" could inform "whether the plan administrators had any duty to communicate information to the former employees" at that time. *Id.* The Court's order was not a mandate to permit unbridled discovery. It was designed to resolve a specific disputed issue regarding ERISA preemption. In fact, substantial discovery was undertaken on this issue.[3] Upon review of the evidence produced as a result of this discovery, the circuit court concluded that no factual dispute remained regarding preemption. Again, as we indicated, this determination was wholly proper. The circuit court's actions and disposition were entirely consistent with our Supreme Court's remand order.

Affirmed.

/s/ Richard A. Bandstra
/s/ Henry William Saad
/s/ Donald S. Owens

[3] On remand, the parties took depositions and exchanged thousands of discovery documents.